

United States
Circuit Court of Appeals

for the Ninth Circuit 10

UNITED STATES OF AMERICA, HAROLD L. ICKES, Secretary of the Interior, Henry Ger- tion Project, et al., tion Projec, et al.,

Appellants,

vs.

AGNES McINTIRE, FLATHEAD IRRIGATION DISTRICT, a corporation, ALEX PABLO, and A. M. STERLING,

Appellees.

FLATHEAD IRRIGATION DISTRICT, a cor- poration,

Appellant,

vs.

AGNES McINTIRE, ALEX PABLO, and A. M. STERLING,

Appellees.

SUPPLEMENTAL

Brief of Appellant

FLATHEAD IRRIGATION DISTRICT

Walter L. Pope
Russell E. Smith
Allen K. Smith,

Attorneys for Appellant.

Upon Appeals from the District Court of the United States for the District of Montana.

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SUPPLEMENTAL BRIEF OF APPELLANT,
FLATHEAD IRRIGATION DISTRICT

Because the decision of the Supreme Court in United States vs. Powers et al, decided January 9, 1939, confirms the position taken by this appellant in the oral argument, because many months have elapsed since the hearing, and because the original brief does not fully disclose that position, counsel wish to reiterate briefly the contentions made on oral argument at the hearing of this cause and to point out the language of the Supreme Court which now gives new support to those contentions.

We therefore ask leave to file this supplemental brief.

The trial court and the respondents both proceeded upon the theory that Section 19 of the Act of Congress of June 21, 1906, (34 Stat. L. 354) authorized the private appropriation of waters. We pointed out on pages 31 to 34 of our original brief that any decree which gives to one Indian a definite amount of water with a definite priority as does the decree in this case, is a nullification of Section 7 of the Act of 1887. Such a decree does not provide for the "just and equal distribution" required by the 1887 Act;—the decree, *ex vi termini* requires an *unequal* distribution.

This section of the Act of 1887 formed the basis of the decision of the Supreme Court in the Powers case.

Throughout the entire opinion the court speaks of “equal rights.” Of the 1887 Act the court says:

“The statute itself clearly indicates Congressional recognition of *equal rights* among resident Indians.” (Italics supplied).

And of the Secretary’s powers the court said:

“Certainly he could not affirmatively authorize unjust and unequal distribution.”

If the secretary could not authorize an unequal distribution, how can a court decree that these respondents shall have the waters of Mud Creek, “prior to any of the rights of the United States or any other person?” (Opinion, R. 171, incorporated in Decree, R. 224, 226; See Conclusion II, R. 220). It is obvious that the doctrine of prior appropriation is absolutely inconsistent with the doctrine of equal rights.

The Supreme Court also held that the Treaty itself guaranteed that the Indians should have equal rights.

“Respondents maintain that under the Treaty of 1868 waters within the Reservation were reserved for the *equal benefit* of tribal members (Winters v. United States, 207 U. S. 564) and that when allotments of land were duly made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners. The respondents’ claim to the extent stated is well founded.” (Italics supplied).

And further:

“Adoption by the Secretary of plans for irrigation projects to serve certain lands was not enough to indicate a purpose to exclude all other

land from participation in essential water and thereby destroy the *equal interest* guaranteed by the Treaty." (Italics supplied). U. S. v. Powers, supra.

The Crow Treaty goes no further in this respect than does the Flathead treaty, and consequently a construction of Section 19 of the Act of 1906, which permits prior appropriation on an Indian reservation, amounts to a nullification of the Flathead Treaty. Our original brief pointed out that Section 19 was a mere saving clause, and cited authorities which hold that for that reason it cannot be held to create any right of prior appropriation. The Supreme Court has now furnished a further reason why that section should not be so construed. The court says:

"If possible, legislation subsequent to the Treaty must be interpreted in harmony with its plain purposes."

The court will recall that in the oral argument we departed from the original brief with respect to the application of the doctrine of the Powers case to this action. We now wish to outline that argument for the court.

If this court finds that it is necessary to determine the nature and extent of respondents' rights, and if this court should find, as it did in the Powers case, that the respondents have rights equal only to the rights of other allottees on the reservation, then we wish to call to the court's attention the fact that even under a system assuring equal water rights to all of the Indians or

their successors, the United States still has the power to insist that, where that can be done, all water must be taken from the Indian irrigation system, and that charges for operation and maintenance be assessed equally. As was pointed out in our original brief herein, equality of right is not insured by simply saying that each allottee's right to the water is equal in amount to the right of each other allottee. The geographical distribution of the land on the Flathead Reservation and other reservations is such that it would be physically impossible for a majority of the Indians living within the reservation to secure water for their lands in the absence of some central irrigation system. It could not be that the United States intended to prefer those Indians who, by reason of their proximity to a stream, could secure water through a simple gravity system over those Indians living miles away from the stream. Section 7 of the Act of 1887 does not limit the allottees to equality in amount, rather it provides that the Secretary shall make rules and regulations to secure a just and equal *distribution* of the waters. For that reason we now urge, as we urged in our oral argument, that assuming that the allottees have equal rights to the use of water, still the United States as trustee had the power and the right for the purpose of equalizing the burden of distribution and providing for a just distribution, that each Indian should secure his water through the irrigation system provided, and should pay his pro rata share of the operation and

maintenance of that system. Such requirement does not conflict with Section 7 of the Act of 1887, but in reality provides the just and equal distribution required thereby.

The court should recall that in this case it is shown that the lands of the parties are susceptible to irrigation from the irrigation system. Since it is not shown that there has ever been any attempt by the respondents to secure water from that system, we say that the respondents are not entitled to any relief. This case differs from the Powers case in that all the lands here involved are irrigable from the project system (R. 262, 263, 264) whereas in the Powers case, as the Supreme Court said, none of the lands were within the ambit of the government projects. It is to be noted that respondents could quickly secure water from the government system by simply making a request therefor. (R. 262, 263, 264).

If we require that each allotment owner, regardless of his peculiar position with respect to the stream, must bear the burden of carrying the water to his own land, then we are nullifying the intent and purpose of Section 7 of the Act of 1887, for the reason that actually no Indian living more than a mile or so from the stream could possibly secure the water which was rightfully his without the aid of a central irrigation system.

We therefore ask that the court dismiss the bill of complaint in this cause for the reason that there is no

showing that the respondents have ever been denied the right to take water from the system, which under the circumstances in this case, is the only right that they have.

Respectfully submitted,

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Attorneys for Appellant.

Flathead Irrigation District.